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Supreme Court, U.S.
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 399

SOUTHERN RAILWAY COMPANY, Petitioner,

v.

OLIVIA COX LUNSFORD, Administratrix of the Estate of J. M. Cox, Deceased, Respondent.

REPLY BRIEF FOR RESPONDENT

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REPLY BRIEF FOR RESPONDENT

This brief is in reply to defendant's supplemental brief.

In contending there was no evidence as to a bad condition of the track at the point of initial derailment, defendant claims that witness Lunsford gave evidence of a track condition two months after the accident, his testimony showing two crossties in very bad condition, as see Exhibit E.

On page 6 of defendant's brief it is said that the witness Lunsford did testify that he visited the scene of the derailment Sunday after the Tuesday on which the accident happened but defendant contends on page 6 of brief, "He gave no testimony as to any defective condition of the track discovered by him at either point on that visit." The defendant's contention is that the condition of the track Lunsford was testifying about was on April 10, 1933, when the photographs were taken, Lunsford giving a full description of the

defective condition of the ties on this trip. On page 55 of the record Lunsford testified:

> "The track and the ties and all were in substantially the same condition when Orr took the photographs that they were in when I went there Sunday."

This makes Lunsford's testimony as to the condition of the track in April apply to the condition which he found there on the Sunday after the Tuesday (February 14) on which the accident happened.

Irrespective of this evidence as to the condition of the track shown by Lunsford and the various photographs, the derailment itself was evidence of a defect either in the track or rolling stock.—See Yonge v. Kinney, 28 Ga., page 111.

When we consider the fact that expert trainmen, as shown in our previous brief, testified that they had run over small rocks such as were found at this place, even without any derailment, and when we consider the additional fact that the credibility of the negro child was for the jury, we can see that the Court of Appeals of Georgia and the Supreme Court of Georgia, which refused to grant a writ of certiorari to the judgment of the Court of Appeals, had evidence to sustain the ruling that the evidence justified the verdict on both counts, that is, on the negligent condition of the track, roadbed and right-of-way, as well as on the defective condition of the watchman.

Defendant on pages 19 and 20 of its brief sets forth the averments in each count as to the watchman. The first count relied both upon the defective condition of the track as negligence and the defective condition of the watchman in failing to stop the train after the initial derailment as a violation of its duty under the Locomotive Inspection Act. The second count set forth that a rock caused the initial derailment and

that after that the watchman, because of its improper condition, failed to stop the train as it should have.

Defendant claims that the suit was brought under the Federal Employers' Liability Act. We fail to see how this can be of any benefit to the defendant. The Federal Employers' Liability Act gives a right of action, of course, to the designated beneficiaries through an administrator. It is not confined to liability for mere negligence but recognizes that the carrier is liable for any negligence which causes injury to an employee and that the employee will not be held guilty of contributory negligence or to have assumed the risks of his employment if a violation of the statutes passed for the safety of employees contributed to cause his death. U. S. C. A. Title 45, section 53, p. 379.

Referring to the Boiler Inspection Act in the Groeger case, this court said on page 528 of 266 U. S.:

> "That act was passed to promote the safety of employees and is to be read and applied with the Federal Employers' Liability Act."

On pages 18 and 19 of defendant's brief it is alleged that there was no allegation that failure of the watchman to function was a violation of the Boiler Inspection Act; that the suit was brought solely under the Federal Employers' Liability Act, and on page 53, in attempting to reply to rule 106 which requires all brake valves to work properly in all positions, defendant claims there was no charge in the pleadings of a violation of rule 106.

In reply we state that the rules of the commission are taken judicial cognizance of by the courts just as is the Boiler Inspection Act itself.—See Caha v. U. S., 152 U. S. 211; Casarello v. U. S., 271 Fed. 486, and Napier v. Atlantic, etc., Co., 272 U. S. 605.

A pleader in Georgia (and everywhere else so far as we know) is not required to plead the law but only to plead the facts and the court will apply the applicable law.—See case of Gainesville, etc., Rwy. v. Vandiver, 141 Ga. 360, in which the court said:

> "When a suit is brought against a carrier by an employee on account of an injury sustained in the operation of its locomotive and cars, all that is necessary for the plaintiff to allege is a statement of the facts showing his relation as an employee and the circumstances under which he sustained his injury, showing negligence and a right of recovery; and on the trial of the case, if the plaintiff shows a right to recover under any law of which the court will take judicial cognizance, that law will be applied."

Also, in case of M. K. &.T. Rwy. v. Wulf, 226 U. S. 570, the Supreme Court held that the court would take judicial cognizance of the applicable law to a suit brought by an employee against a carrier and that even though the suit erroneously set forth the State law and claimed rights under it, the court would ignore such claim and enforce the Federal law if the Federal law were applicable.

On pages 21 and 22 of defendant's brief the claim is made that it is consistent with fireman Goree's testimony that the watchman may have actually worked just as the engine turned over, quoting Goree's testimony to the effect that Goree thought the engineer put on the brakes just at the final turnover; that he did not see him but heard the exhaust; that he could not be certain whether the exhaust he heard was the engineer or the little watchman.

As a matter of fact, there is no proof that any brake was put on just before the final derailment. The fireman only thought the engineer put the brake on because he heard the

exhaust, and the court knows that the engineer and fireman both sit in the cab close together. It clearly appears that the noise which the fireman heard was the engineer putting on the brake, his testimony on page 54 being as follows:

> "When we struck the second switch to the left, I heard a big noise; I knew something was wrong then; and as quick as that, I heard the exhaust. You see, it is an exhaust; it comes out from the brake valve, that is where you hear it at. When the engineer applies the guage, that is when I hear that noise. I have heard that noise before. I knew that was the engineer putting the air on, I thought that was what it was; I cannot imagine anything else that it was; but by that time the engine was pretty well off the track. When the brake was put on by the engineer the front of it was already off the track."

The fireman expressly testified that the exhaust which he heard at the final turnover could not have been the exhaust from the little watchman. On page 53 the fireman said:

> "I couldn't say that I saw him apply the brakes; I just heard the exhaust like from the brake valve, that is all. That exhaust could not have been the application of the brakes from this little watchman; I don't know as it would have been exactly the same noise, I don't think it would be quite that way."

It will be observed that the fireman was sitting in the same cab with the engineer and the air lever in the engineer's hand took effect on the valve up in the cab and that is where the fireman would have heard the exhaust. The exhaust from the little watchman was something like thirty or forty feet in front and under the body of the engine, and it would not look very reasonable that it could have been heard.

At all events, this hearing of the exhaust only occurred at the time the engine finally turned over. The place where

the little watchman should have functioned, if it had been in order, would have been at the point of initial derailment.

None of the train crew felt any brake put on at all; neither did Goree. The picture of the engine shows it turned completely over and must have been disconnected from the cars. The breaking of the air brake line would cause an exhaust and it is common knowledge would in itself put on the brakes, but this all occurred at the time of the wreck.

But if the watchman were in functioning condition, why did it not function somewhere in the seven-tenths of a mile after the first derailment? It should have operated instantly when the front trucks fell 6¾ inches to the crossties. Yet it failed to operate for that entire seven-tenths of a mile although the conditions demanded its operation if it were in good condition.

The jury were amply justified in finding that it never operated at all anywhere and that the defendant, having inspected it and tested it after the wreck and having produced no evidence as to its condition, virtually abandoned any claim that it functioned.

On pages 22, 23, 24, 25, 26, and 27 of the brief opposing counsel quote largely from Goff's testimony. The facts testified to by Goff were all in plaintiff's favor. His claim that the action of the watchman was at times uncertain related to the effect of curves, which, of course, could have effect only upon the lateral operation of the watchman. He said sometimes a curve would set the watchman (opposing brief page 23) but he agreed that a vertical drop would set it if it dropped 2½ inches, (see opposing brief page 23) and he admitted the truck would drop the height of the rail which is 6¾ inches. See record p. 77, 80, 81.

It was for the jury to evolve the truth out of all this voluminous testimony.

The photographs and drawings of the watchman were in the record and the jury could conclude that under the circumstances there was plenty of contact with the trigger in both a vertical fall of the truck and in a side movement of the truck to apply the watchman.

If any brake had been put on at all, either service or emergency application, the whole crew, including the engineer, would have known it. It would have disclosed trouble and would have resulted in a stoppage not only from the watchman itself but the engineer would have had opportunity also to put on the brake. The air brake in emergency is accessible even to the conductor and train hands, as a matter of common knowledge.

On page 27, after quoting Goff's evidence and that of Madden, the superintendent, opposing counsel argue that that is all the testimony regarding Wright's little watchman. Counsel leave out entirely the photographs and the drawings and the character of the track and the marks thereon.

No witness is bound by all the conclusions and contradictions of any witness put on the stand, even though he may put him up himself. The court can see that the plaintiff put up one of the high officials of the defendant company. If there is a conflict between his conclusions that the watchman is an experiment and the facts which he details as to its use for seven years and its presence on every passenger engine, it is for the jury to decide on that conflict. There is no technical estoppel on anybody. We can argue the truth from whatsoever source it appears. There may be a fragment of it from one witness and a fragment from another, and some of it from physical evidence. There is no hide-bound rule that either side must swallow whole any witness he may put up, no matter how it may conflict with common sense or the facts.

Beginning on page 28 the defendant's brief complains of the judge's charge in general terms and says that plaintiff's petition did not allege a violation of the Boiler Inspection Act, and that the judge took this up as a separate proposition from the charge of negligence.

This case was tried in the State court under the State rules of pleading and practice.

Under the Federal Employers' Liability Act, ordinary negligence may be set up and violation of the Boiler Inspection Act or the Safety Appliance Act or similar Federal requirements may be set up. The liability, however, is dependent upon different principles as to the violation of duty under the general charge of negligence and under the Federal appliance acts. B. and O. R. R. v. Groeger 266 U. S., p. 528—Chicago, etc., Co. v. Murray, 40 Wyo. 324.

In W. & A. v. Townsend, 36 Ga. App. 70, this practice of submitting separately these charges of negligence was approved and the charge of the judge below followed the charge in this Townsend case. The court will see, under headnote 5, that the court in that case charged the general law applicable to negligence and the diminution of damages because of the decedent's negligence, and under headnote 6 the court held that as to the Federal Safety Appliance Act the plaintiff could recover full damages irrespective of contributory negligence. In the statement of facts in this case the court say:

> "In the first count liability was predicated on a violation of the safety-appliance act, it being alleged that a defective air-brake caused the brake-shoe to stick, heating a wheel, and thereby causing its collapse, with the consequent derailment of the train. The second count was predicated upon negligence on the part of the defendant, alleging failure to inspect and repair the brakes, and misconduct on the part of the engine crew in failing to stop the train," etc.

It is argued that the device (watchman) did not always work. That may be said of almost any device. But in this case, with a sheer fall from the height of the rail, 6¾ inches, there has never been any reply to the proposition that the trigger should have been forced down. There is no question of curves in a sheer drop. At least this was a question for the jury.

Slight verbal inaccuracies in the charge may be found, as shown on page 31 of opposing brief, where the judge told the jury that if a device was only an experiment and it had not been in general use on this railroad a sufficient length of time to be a fixed device, and if its use was such that the decedent could not rely on it, that then its failure to function would not be negligence and the defendant would not be liable for its failure to operate properly.

This word "negligence" in this connection as shown by the context could mean simply a failure to operate properly. In many of the decisions, and especially in one of the cases from the Supreme Court quoted in our brief, namely the decision of Chief Justice White in Railroad v. Gotschall, 244 U. S. 66, the failure of this safety appliance to operate, under the act of Congress, is called negligence, but it is a mere general way of describing the failure to keep the appliance in proper condition.

The meaning of the judge was too clear to admit of any doubt in this charge. There is no doubt that the judge charged that as to this device there was an absolute requirement that it should be in proper condition. If there was any error in charging that the defendant must be negligent in respect to it, it was an error in favor of the defendant and not against the defendant. No defendant can complain of an error in his favor.

Verbal criticism on pages 32 and 33 is made of the decision

of the Georgia Court of Appeals, it being claimed that after quoting section 2 of the Boiler Inspection Act and confusing that as an amendment of the Federal Employers' Liability Act rather than an amendment of the Safety Appliance Act, the appellate court said the duty to keep their locomotives and all parts and appurtenances thereof free from defects is absolute.

This latter proposition is the important and substantial thing, and the Court of Appeals clearly decided the law when they held that this appliance, being a part and appurtenance of the engine, must be in proper condition at all times.

The court did not make any mistake in its reference to this act except that it referred to the act of April 22, 1908, as amended in 1911 and 1915, as the "Federal Safety Appliance Act," instead of "Boiler Inspection Act," and then quoted the language of the law (the Boiler Act) correctly. What difference does it make that the court did not call it the Boiler Inspection Act? It is not now a mere "boiler" act but is a locomotive act. The court referred correctly to the date of the passage of the amendment, quoted its language correctly and referred to its correct place in U. S. C. A. and gave it the correct construction.

The only error in the charge was in favor of the defendant in submitting to the jury the question as to whether this device was an experiment. The uncontradicted evidence shows that it was not an experiment. No case can be found in the books where a device, which is made a working part of all the passenger engines on a railroad, has been classified as an experiment rather than a part or appurtenance of the engine.

The defendant's argument beginning on page 35 of its brief repeats the argument that if the watchman had never been on this engine the same accident would have happened and yet there would have been no liability.

Defendant overlooks the proposition that it is given the right to select its own type of locomotive; that it creates its own standard of safety by the appliances which it places on its own locomotive; and that the Boiler Inspection Act, in requiring all parts and appurtenances on the entire locomotive to be in proper condition, applies to each particular locomotive of every type which the defendant has.

It is argued that the device merely failed to interrupt the natural sequence flowing from the derailment. So do we say the air brake in the hands of the engineer merely fails to interrupt the sequence, but if it were out of order there would be liability. So does the pop-off valve fail to interrupt the sequence from rising steam pressure, but there would be liability if it failed to work and the boiler exploded.

The brief then suggests that in order to escape liability in future cases for derailments of front trucks, all the defendant would have to do would be to remove the little watchman and thus lower its standard of safety.

The employees and persons dealing with the company then would also know where they stood. Employees acquire a right in the kind of instrumentalities which the employer furnishes them. It is for their safety that these laws are passed, and the laws say that whatever is on that engine as a part and appurtenance must be in proper condition.

On page 60 of the rules (Rule 106) of the commission the brake system of the locomotive is dealt with and the rule provides that it must be known before each trip "that the brakes on locomotive and tender are in safe and suitable condition for service; that the air compressor or compressors are in condition to provide an ample supply of air for the service in which the locomotive is put; that the devices for regulating all pressures are properly performing their functions; that

the brake valves work properly in all positions; and that the water has been drained from the air-brake system."

The watchman was nothing but an automatic brake. It worked on the same air brake line that the engineer's brake handle worked on. This rule requires the entire brake to be in good condition and defendant had made this watchman a part of that brake on the locomotive. It was required that the brake valves work properly in all positions. Practically the whole of the watchman was the brake valve because the trigger which would be tripped was attached to that valve.

Defendant in its brief on page 53 complains that there was no charge in the pleadings of a violation of rule 106. We have already shown that the law and the rules of the commission are required to be known by the court. We pleaded that the watchman was in a defective condition and would not function. We proved that the conditions were there which would have made it function, if it had been in good condition. Thus we have a specific rule of the commission applicable to the watchman which was but a part of the brake system of the engine, and we have also a general rule (102) which applied to every part of the engine and required its inspection.

Defendant quotes, page 49 of brief, the case of Chicago, etc., Co. v. Murray, 40 Wyo. 324, 277 Pac. 703, 706. That was a case where an engineer used a reach rod which connected with the sand box as a handhold to climb on the engine. It was defective and he was injured. The railway claimed that it was not being used as contemplated, that is, as a mere lever but the engineer replied it was customary to use it as a handhold in climbing. The court used the language quoted in defendant's brief. It appeared that the sand was applied in two ways,—one automatically by an air compressor which moved the sand out by pressure, and the other was this

particular rod which merely opened a valve and allowed it to come out by gravity. The court quoted the rule of the commission and held in substance that rule 120 only applied to the air compressor which removed the sand from the sand dome. The court referred to the removal of the sand by the hand lever as customarily resorted to when the air sander (the automatic air pressure apparatus) would not work and is referred to as "an emergency or secondary method." The decision then proceeds to state that the hand sander is controlled from the cab of the locomotive by a movement by hand of a reach rod and said, after quoting rule 120, "But the hand sander was only a secondary sanding apparatus, and there was no evidence that the air sander was not in safe and suitable condition and a sufficient compliance with the rule." The court then went ahead to say that the Boiler act itself applied to the reach rod of the hand sander for it was one of the parts or appurtenances of the locomotive, the court using the following language on page 706:

> "But the reach rod of the hand sander was one of the parts or appurtenances of the locomotive which, by section 2 of the Boiler Inspection Act, the carrier was bound to keep in proper condition and safe to operate in the service to which the same are put, and it becomes necessary to inquire as to the meaning of those words in their application to the case at bar."

The court, it will be thus seen, applied the general requirement of the Boiler Inspection Act to this hand sander, although it was not covered by the rules of the Commission, and the court, after the quotation just made, proceeded to quote from the Groeger case as showing that the standard as to being in proper condition and safe to operate, etc., was not too indefinite to be applied.

The court, however, did reverse the decision below on the ground that the court below charged the jury that it was

the carrier's duty to keep the reach rod hand sander safe for use as a hand hold, in climbing, if such use was reasonable, the court holding that the carrier would not be required to keep the rod in proper condition for such a use unless the carrier knew that the rod was customarily used as a hand hold or that it ought to have anticipated such use.

Defendant claims in its brief that with respect to the watchman the defendant might have been liable under the common law for failure to exercise ordinary care in keeping it in repair, if the evidence had justified such a finding. See defendant's supplemental brief p. 37. We say that this contention by the defendant would require the court to apply the standard of the Boiler Act and not the common law.

In the case of B. & O. v. Groeger, 266 U. S. on page 528, this court said:

> "By the last mentioned section (and section 2 of the Boiler Act was the section which was being construed), defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide."

In the case quoted by the defendant of C. B. & Q. v. Murray, from Wyoming, reported in 40 Wyo. 324 and 277 Pac. 703, the court, on page 708 of 277 Pac. Rep., used the following language:

> "The phrase 'in the service to which the same are put', as contained in section 2 of the Boiler Inspection Act, must be taken to mean the service for which the appliance is designed, or to which it is put with the employer's knowledge and acquiescence. The common law duty to exercise ordinary care to keep appliances reasonably safe for such purposes has, by the statute, become an absolute duty to keep them safe for the same purposes."

Words could not better explain the fact that if the common law ever applied to this watchman, as the defendant in its brief on page 37 admits is the case, the Boiler Inspection Act equally applies to it.

The defendant's contention that failure of the Commission (and of course the court will understand it is our contention the Commission has covered the watchman by rules 102 and 106) to require or deal with any part or device on an engine relieves the carrier from the effect of the Boiler Inspection Act is really squarely decided against the defendant by this court in the case of Great Northern, etc., Co. v. Donaldson, 246 U. S. 121, in which a locomotive engineer was killed by the explosion of a boiler, and it was contended that the engine was not in proper condition under the Boiler Inspection Act because of the use of crown bolts with large button heads. It was contended by the carrier that the Federal boiler inspectors, who acted under the Commission's orders, did not disapprove these buttons when they inspected the engine, and the Supreme Court made the following statement:

> "Nor can we agree with the contention of the plaintiff in error that, so long as the large button head had not been disapproved by the government inspector, such fact is conclusive of the sufficiency of the type in use. We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal boiler inspector."

The effect of the foregoing decision is to say that mere negative action of the Commission, that is, failure to disapprove a feature of construction when inspected by the Federal boiler inspector, does not relieve the carrier for an unsafe locomotive, under section 2 of the Boiler Act.

So we say a mere failure to cover all the parts of the locomotive by the Commission's rules does not approve either the presence or the condition of other features of the locomotive not dealt with.

Surely it is not to be considered that as to those parts of a locomotive as to which the Commission has made no requirements, this statute allows them to be in dangerous condition or not in proper repair. The argument of the defendant would lead to the result that there is no requirement as to proper condition of any part of the locomotive unless the Commission has either designated its dimensions, contents and architecture or required it to be inspected, or tested, and this in the face of the proposition that this court, in all of its decisions, has recognized that the Commission has not covered anything like the whole ground as to parts and appurtenances of locomotives but instead the Commission has left the main architecture of the locomotive and its type to the discretion of the carrier and has provided in its own rules that they are the minimum requirement and that the carrier is encouraged to make its own rules in the interest of safety.

Respectfully submitted,

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